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Notes

Outdoor Accessibility Requirements of the Americans with Disabilities Act: Must Holders of Conservation Easements Provide ADA Access?

by

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1. These symbols represent several options that the Regulatory Negotiation Committee on Accessibility Guidelines for Outdoor Developed Areas ("Regulatory Negotiation Committee") considered to designate a trail that fully complies with the Americans with Disabilities Act (ADA). See ARCHITECTURAL AND TRANSP. BARRIERS COMPLIANCE BD., REGULATORY NEGOTIATION COMMITTEE ON ACCESSIBILITY GUIDELINES FOR OUTDOOR DEVELOPED AREAS FINAL REPORT app. at 87 (Sept. 30, 1999) [hereinafter REGULATORY NEGOTIATION COMMITTEE FINAL REPORT], available at <http://www.access-board.gov/outdoor/outdoor-rec-app.htm>. The entire report may be viewed at <http://www.access-board.gov/outdoor/outdoor-rec-rpt.htm>.

Felch and Nida Brobinsky are considering making a donation to a local land trust of a conservation easement—a device that enables a landowner to donate certain discrete property rights to a qualified organization for the purpose of protecting the land in perpetuity. The Brobinskys intend the protective easement to cover the back forty acres of their scenic 120-acre ranch, and are open to the notion of public access, as that portion of their land borders Carp Creek, which supports a large swimming hole. Because a path leading from an accessible trailhead already exists, offering permanent public access would be a natural and satisfactory contribution. The Brobinskys and the land trust, however, wonder to what extent, if at all, the operation of this easement will invoke the Americans with Disabilities Act, and if so, which of the two, donor or donee, would be responsible for its implementation. And if the law should apply, given that the existing trail covers uneven and rocky terrain, are there any possible exceptions?

The provisions of the Americans with Disabilities Act (ADA or the “Act”) cover a wide range of activities and settings. Generally, Title I imposes requirements on employers to provide persons with disabilities equivalent employment opportunities; Title II of the Act emphasizes accessibility to services, programs, or activities of public entities; while Title III expands the Act’s coverage to places of public accommodation. Although the Act itself provides examples of what types of entities are subject to the public accommodation requirements, ambiguities remain as to the Act’s applicability. One such question involves land encumbered by a conservation easement: land open to the public, operated and/or maintained by a private entity, but which arguably does not implicate interstate commerce as required by the Act to invoke its “public accommodations” provisions. Should the spirit if not the letter of the ADA render such an area subject to the Act’s requirements?

Introduction

In 1990, Congress enacted the Americans with Disabilities Act² to protect from discrimination the millions of Americans living with a recognized form of disability.³ Congress intended the ADA to bolster

2. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (2002)).

3. See 42 U.S.C. § 12101, which provides:

(a) Findings

The Congress finds that—

the Civil Rights Act of 1964 by including disabled persons in the

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

ambit of protected classes already defined as needing special protection from discrimination.⁴ Acknowledging that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[.]”⁵ Congress sought to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]”⁶ To this end, the ADA imposes requirements on activities of public entities⁷ and on places of public accommodation⁸ to eliminate barriers and other impediments to those with physical and mental disabilities substantially limiting one or more major life activities.⁹

Generally, this Note will explore the ADA’s applicability to outdoor recreation areas, specifically those areas protected by conservation easements. First, this Note will cover the extensive

4. See Robert L. Burgdorf, Jr., “*Equal Members of the Community*”: *The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 *TEMPLE L. REV.* 551, 552–53 (1991), for further discussion on the nexus between the Civil Rights Act of 1964 and the ADA. Professor Burgdorf explained:

In the Civil Rights Cases, decided in 1883, the Court posited, without deciding, that “a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement is one of the essential rights of the citizen” In 1964, in his concurring opinion in *Bell v. Maryland*, Justice Douglas stated that “the right to be served in places of public accommodations is an incident of national citizenship.” Justice Goldberg, concurring separately in that case, declared his belief that all Americans are guaranteed “the right to be treated as equal members of the community with respect to public accommodations.” Both Justice Douglas and Justice Goldberg viewed access to public accommodations as a legally protected “civil right.” The Justices’ characterization of equal access was endorsed by the enactment of the Civil Rights Act of 1964. Subchapter II of the Civil Rights Act prohibits discrimination based upon race, color, religion, or national origin in “places of public accommodation.”

Id. (footnotes omitted).

5. 42 U.S.C. § 12101(a)(2).

6. *Id.* § 12101(b)(2).

7. See *id.* § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

8. See *id.* § 12182 (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

9. See JOHN PARRY, *REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONER’S GUIDE TO IMPLEMENTATION* 2 (1996).

requirements to properly craft such an easement.¹⁰ Some conservation easements require that the protected area be open to public access to qualify for a federal income tax deduction, which in turn may subject the easement holder to personal injury liability¹¹ as well as to such statutory mandates as the ADA.

After explicating the factors relevant to creating a conservation easement, this Note will turn to the requirements of the ADA on public entities and places of public accommodations: the Act's general guidelines pertaining to such facilities and the specific requirements for outdoor areas. Because outdoor areas present unique problems in contemplating accessibility for persons with disabilities, the proposed rules for outdoor recreation areas allow for several exceptions from the Act's obligations, to which this Note will devote particular consideration.

Land trusts contemplating accepting a donation of a conservation easement must consider whether opening the land to the public will subject it to the requirements of the ADA. In closing, the Note will explore ways in which operation of the easement could implicate ADA compliance, and in what scenarios ADA compliance could be avoided.

I. Background

A. Conservation Easements for Land Protection:

Qualifying a Contribution of a Property Interest for Tax Deductibility

Conservation easements offer a unique strategy in the land conservation movement: somewhere between outright acquisition of swaths of open space on one end of the spectrum and governmental regulation aimed at preventing environmental degradation on the other.¹² The notion of surrendering development rights to a conservation organization in pursuit of a charitable contribution deduction, while maintaining fee ownership of the underlying land, has inspired innumerable landowners to take advantage of this

10. See generally 26 U.S.C. § 170(h) (2002).

11. For a discussion of personal injury liability attendant in conservation easement-encumbered lands open to the public, see Chris Cole, *Tort Liability and Land Trusts: How Safe Are You?*, in THE BACK FORTY ANTHOLOGY: SELECTED ARTICLES FROM THE NEWSLETTER OF LAND CONSERVATION LAW § 1.53 (1995).

12. See JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 2 (Katherine Barton & Caroline Pryor eds., 1988).

device.¹³ Not only does a qualified contribution allow a federal income tax deduction, but the surrender of the land's development rights often lessens the land's overall value, which in turn reduces the landowner's property tax obligations, and ultimately, the landowner's heirs' estate tax burden.¹⁴

To qualify for a federal income tax deduction, the donation must meet the Internal Revenue Code's (IRC or the "Code") strict requirements. Generally, a charitable contribution is not allowed unless the interest conveyed consists of the owner's entire interest in the property (other than certain transfers in trust).¹⁵ For more than twenty years, however, the Code has sanctioned a charitable deduction for a "qualified conservation contribution," defined as the grant "of a qualified real property interest to a qualified organization exclusively for conservation purposes."¹⁶ To be properly deductible, the conservation purposes must be protected in perpetuity.¹⁷

The definition of a "qualified real property interest" includes a "perpetual conservation restriction."¹⁸ Such a restriction is one granted in perpetuity on the use which may be made of real property, i.e., an easement or other interest in property having attributes under state law similar to an easement, such as a restrictive covenant or equitable servitude.¹⁹ Any rights reserved by the landowner must be consistent with the qualified conservation purpose.²⁰

Further, the qualified real interest must be granted to a "qualified organization."²¹ Four categories of organizations meet the criteria established by the regulations.²² Such an organization may be "[a] State, a possession of the United States or any subdivision of any of the foregoing, or the United States, or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."²³

13. *Id.* at 1.

14. *See id.* at 8-9.

15. Treas. Reg. § 1.170A-14(a) (as amended in 1999).

16. *Id.*

17. *Id.*

18. *Id.* § 1.170A-14(b)(2).

19. *Id.*

20. *Id.* See also Treasury Regulation sections § 1.170A-14(d)(4)(ii), (d)(5)(i), (e)(3), and (g)(4), for a discussion of restrictions placed on interests retained by the donor.

21. *See* Treas. Reg. § 1.170A-14(c).

22. Treas. Reg. § 1.170A-14(c)(1)(i)-(iv).

23. 26 U.S.C. § 170(b)(1)(A)(v), (c)(1) (2002); *see also* Treas. Reg. § 1.170A-14(c)(1)(i).

Alternatively, the donee organization may be a corporation, trust, or community chest, fund, or foundation created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States.²⁴ Entities in the second category must also be “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes,” with no part of their net earnings inuring to the benefit of any private shareholder or individual, and “not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation” or to promote a political candidate.²⁵ Finally, such an organization must normally receive a substantial part of its support (exclusive of income received in the exercise or performance of its charitable purpose) from a governmental unit or from direct or indirect contributions from the general public.²⁶ Interestingly, the regulations do not require that such an organization have a dominant conservation purpose, though the enabling laws of many states impose such a requirement.²⁷

Finally, to qualify for deductibility the interest must be granted exclusively for one or more “conservation purposes.”²⁸ Eligible purposes include the “preservation of land areas for outdoor recreation by, or education of, the general public”;²⁹ “the protection of a relatively natural habitat of fish, wildlife, or plants, or similar

24. See 26 U.S.C. § 170(b)(1)(A)(vi), (c)(2)(A); Treas. Reg. § 1.170A-14(c)(1)(ii).

25. 26 U.S.C. § 170(c)(2)(B)–(D).

26. *Id.* § 170(b)(1)(A)(vi).

27. See, e.g., CAL. CIV. CODE §§ 815–817 (West 2002). Two other types of organizations meet the criteria of the Internal Revenue Code as “qualified organizations,” although their prevalence is far less common. See 26 U.S.C. § 170(h)(3)(B); Treas. Reg. § 1.170A-14(c)(1)(iii), (iv). These include charitable organizations described in Internal Revenue Code section 501(c)(3), which is practically identical to the description of organizations qualifying under the second criterion sans the requirement that the organization be created or organized in or under the laws of the United States, its states, or possessions. See 26 U.S.C. § 170(h)(3)(B)(i); Treas. Reg. § 1.170A-14(c)(1)(iii); see also 26 U.S.C. § 501(c)(3). These organizations must also meet the public support test of section 509(a)(2)—an entity normally receiving more than one third of its support in each taxable year from any combination of gifts, grants, contributions, or membership fees, and a number of other sources. See 26 U.S.C. § 509(a)(2). Finally, the definition of a qualified organization includes those organizations described in section 501(c)(3) that meet the requirements of section 509(a)(3) (essentially those organized and operated for the benefit of or to carry out the purposes of, and controlled by or in connection with, an organization described in section 509(a)(1) or (2)), and which are controlled by one of the three other “qualified organizations.” See 26 U.S.C. §§ 170(h)(3)(B)(ii), 509(a); Treas. Reg. § 1.170A-14(c)(1)(iv).

28. See Treas. Reg. § 1.170A-14(a).

29. 26 U.S.C. § 170(h)(4)(i); see also Treas. Reg. § 1.170A-14(d)(1)(i).

ecosystem”;³⁰ “the preservation of open space (including farmland and forest land);”³¹ and “the preservation of an historically important land area or a certified historic structure.”³²

As to the first purpose—areas for recreation by or education of the general public—the recreation or education must be for the “substantial and regular use of the general public,” meaning that access must be afforded.³³ The regulations provide that access to a water area which allows fishing or boating opportunities to the general public or a nature trail open for public hiking would satisfy this conservation purpose.³⁴

The other three conservation purposes provided in the Code may but do not often entail public access. Significant habitat or ecosystems must be in a “relatively natural state,” and tend to comprise “habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial . . . or aquatic communit[y]”; and areas that contribute ecologically to already established local, state, or national parks, preserves, refuges, wilderness areas, or other conservation districts.³⁵ Because of the ecological value of these lands, access to the general public is neither required nor common.³⁶

Preservation of open space requires that the donation occur “[p]ursuant to a clearly delineated Federal, state, or local governmental conservation policy and will yield a significant public benefit”; or be made “[f]or the scenic enjoyment of the general public and will yield a significant public benefit.”³⁷ Many factors may be considered when assessing a land’s scenic potential, including “if development of the property would impair the scenic character” of the surrounding rural or urban landscape or “would interfere with a scenic panorama” enjoyed from a park, trail, nature preserve, road, or water body and such area or transportation way is accessible and open to the public.³⁸ To satisfy the requirement of scenic enjoyment, visual rather than physical access to or across the property by the

30. 26 U.S.C. § 170(h)(4)(ii); *see also* Treas. Reg. § 1.170A-14(d)(1)(ii).

31. 26 U.S.C. § 170(h)(4)(iii); *see also* Treas. Reg. § 1.170A-14(d)(1)(iii).

32. 26 U.S.C. § 170(h)(4)(iv); *see also* Treas. Reg. § 1.170A-14(d)(1)(iv).

33. Treas. Reg. § 1.170A-14(d)(2)(ii).

34. *Id.* § 1.170A-14(d)(2)(i).

35. *Id.* § 1.170A-14(d)(3)(i), (ii).

36. *Id.* § 1.170A-14(d)(3)(iii).

37. *Id.* § 1.170A-14(d)(4)(i)(A), (B).

38. *Id.* § 1.170A-14(d)(4)(ii)(A).

general public is sufficient so long as the amount of visibility is enough to meet the “significant public benefit” element.³⁹

Finally, historic preservation requires that the property include a significant historic land area or a certified historic structure.⁴⁰ Here, at a minimum, visual access of the historic property is required.⁴¹ Where the donated historic land area or structure is not visible from a public way, the terms of the easement must allow for public access “on a regular basis to view the characteristics and features of the property . . . to the extent consistent with the nature and condition of the property.”⁴²

As will be discussed further, various possible configurations of a conservation easement may invoke ADA compliance on the protected property. Certainly those easements requiring public access will invoke ADA compliance, although the particulars of the easement may allow for conditional departure from the ADA’s requirements.

B. Application of the Americans with Disabilities Act of 1990: Who Is Subject To Its Provisions and What Does It Require?

Apart from those requirements imposed on employers, the sweeping accessibility provisions of the Americans with Disabilities Act begin with public entities.⁴³ The general rule of section 202 of the Act provides: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁴⁴

39. See *id.* § 1.170A-14(d)(4)(ii)(B). The numerous factors considered when assessing the degree of public benefit served by the donation include “[t]he uniqueness of the property to the area”; “[t]he intensity of land development in the vicinity of the property” (both existing and foreseeable development); “[t]he consistency of the proposed open space use with public programs . . . for conservation in the region”; and “[t]he population density in the area of the property.” *Id.* § 1.170A-14(d)(4)(iv)(A)(1)–(11).

40. See Treas. Reg. § 1.170A-14(d)(5)(i)–(iii).

41. *Id.* § 1.170A-14(d)(5)(iv)(A).

42. *Id.* In determining the type and amount of access required to qualify for a deduction under Internal Revenue Code section 170(h), the Service will consider the historical significance of the property, the nature of the property’s features, the remoteness or accessibility of the site, possible physical hazards inherent in the property, the extent to which public access would infringe on the inhabitants of the property, the degree to which access would impair the preservation interests of the property, and the availability of opportunities for the public to view the property in ways other than visits to the site. *Id.* § 1.170A-14(d)(5)(iv)(B); see also *id.* § 1.170A-14(d)(5)(v).

43. See 42 U.S.C. §§ 12131–12165 (2002).

44. *Id.* § 12132.

Pertinent definitions include "public entity," which means "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government";⁴⁵ and "qualified individual with a disability," which means:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participations in programs or activities provided by a public entity.⁴⁶

The Supreme Court on numerous occasions has held that when Congress writes a statute in plain words those plain words are to be the paramount guides utilized by the courts in construing the statute.⁴⁷ Looking simply to the text of the statute, therefore, one would likely conclude that the ADA covers all areas of local and state governance.⁴⁸ Accordingly, courts have held myriad entities to fall squarely within the ADA's "public entity" provisions, namely local police departments,⁴⁹ city planning and zoning boards,⁵⁰ state courts,⁵¹ and state universities.⁵² Other courts have broadened the ADA's coverage by determining that various entities come within the ADA's provisions under an "instrumentality of the state" analysis, such as

45. *Id.* § 12131(1)(A), (B).

46. *Id.* § 12131(2).

47. *See, e.g.,* *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

48. *See Saunders v. Horn*, 960 F. Supp. 893, 897 (E.D. Pa. 1997) (relying heavily on the plain text of the ADA to determine that the ADA applies to state and local correctional facilities).

49. *See Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998).

50. *See Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd in part*, 117 F.3d 37 (2d Cir. 1997).

51. *See, e.g., Soto v. City of Newark*, 72 F. Supp. 2d 489 (D.N.J. 1999) (municipal court wedding ceremony was "service" within meaning of Title II of ADA); *Galloway v. Superior Court*, 816 F. Supp. 12 (D.D.C. 1993) (District of Columbia and its superior courts subject to ADA); *People v. Caldwell*, 603 N.Y.S.2d 713 (N.Y. Crim. Ct. 1993) (New York state court system required to comply with ADA), *aff'd*, 661 N.Y.S.2d 436 (App. Term 1997).

52. *See Darian v. Univ. of Mass. Boston*, 980 F. Supp. 77 (D. Mass. 1997).

nonprofit high school athletic associations⁵³ and boards of trustees of city police pension funds.⁵⁴

Title III of the Americans with Disabilities Act prohibits discrimination on the basis of an individual's disability by persons or entities providing public accommodations or commercial facilities.⁵⁵ Section 302 of the Act states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

The ADA extends the list of public accommodations beyond those covered by the 1964 Civil Rights Act; indeed, with the exception of sales or rentals of residential housing, the twelve categories specified in the ADA include almost every type of operation which is open to business or in contact with the general public.⁵⁶ Title III requires that the operations of public accommodation "affect commerce," and lists twelve distinct categories of such entities, namely places of lodging, establishments serving food or drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for specified public transportation, places of public display or collection, places of amusement, places of education, social service center establishments, and places of exercise or physical recreation.⁵⁷ Notably, when faced as a matter of first

53. See *Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 584, 590-91 (N.D. Ohio 1996); *Hoot v. Milan Area Sch.*, 853 F. Supp. 243, 251 (E.D. Mich. 1994).

54. See *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1129 (C.D. Ill. 1995). The court in *Piquard* noted, "An instrumentality is defined as 'something by which an end is achieved; a means, medium, agency.' Black's Law Dictionary 801 (6th ed. 1990). . . . The Board [of Trustees] is used as the means or medium by which the City determines eligibility for pension and disability benefits for its employees." *Id.*; see also *Holmes v. City of Aurora*, No. 93C0835, 1995 WL 21606, at *4 (N.D. Ill. Jan. 18, 1995) (deeming city police pension fund "public entity" under Title II of ADA).

55. See 42 U.S.C. §§ 12181-12189 (2002).

56. See Robert L. Burgdorf, Jr., *The Americans with Disabilities Act Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 471 (1991).

57. See 42 U.S.C. § 12181(7)(A)-(L). Congress intended the list to be exhaustive, and thus listed illustrative examples for each category. 2 U.S. Dep't of Justice, Technical Assistance Manual on the Americans with Disabilities Act (BNA) III-1.2000, at 90:0904 (1993), available at <http://www.usdoj.gov/crt/ada/taman3.html>. ADA section 302's definition of public accommodation provides:

The following private entities are considered public accommodations . . . if the operations of such entities affect commerce:

impression as to whether the ADA's provisions for public accommodations applied only to physical structures, the First Circuit Court of Appeals answered in the negative.⁵⁸ Indeed, numerous courts, citing legislative intent, have interpreted the ADA broadly.⁵⁹

In addition, Title III covers "commercial facilities," defined as those facilities intended for nonresidential use and whose operations

(A) an inn, hotel, motel, or other place of lodging, [except for small inns in which the proprietor principally resides];

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(A)-(L).

Like the Civil Rights Act, Congress excluded private clubs from ADA's provisions by specifically cross-referencing entities excluded from Title II of the Civil Rights Act. See 42 U.S.C. § 12187. These entities, however, may fall within ADA's requirements if a private club opens its facilities to members of the public. See Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1129 n.56 (1995). Similarly, places of religious worship are exempted except where they rent space to other groups such as day care providers. See LAURA ROTHSTEIN, *DISABILITIES AND THE LAW* § 5.02, at 359 (2d ed. 1997).

58. See Sullivan, *supra* note 57, at 1129-30 (citing *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994)). The court in *Carparts* compared a situation where a person entering a travel agency to purchase services would be covered by the ADA's terms, whereas another purchasing the same services over the phone would not; citing the Act's regulations and public policy concerns, the court concluded that Congress could not have intended such an "absurd result." *Carparts Distribution Ctr.*, 37 F.3d at 19.

59. See generally Sullivan, *supra* note 57, at 1119, n.6 (citing *Carparts Distribution Ctr.*, 37 F.3d at 19; *Kinney v. Yerusalim*, 812 F. Supp. 547, 550-51 (E.D. Pa. 1993) (construing ADA's term "usability" broadly to effectuate purpose of eliminating discrimination against disabled), *aff'd*, 9 F.3d 1067 (3d Cir. 1993); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994) (on-call admitting physician who had authority and discretion to admit individual patients "operated" hospital within meaning of ADA at time he denied admission to patient infected with HIV)).

will affect commerce.⁶⁰ Courts have interpreted “commercial facility” in different ways, ranging from a place where commercial activities take place but do not involve interaction with the general public⁶¹ to all structures affecting commerce but not falling within an enumerated category of “public accommodation.”⁶² For either definition—public accommodation or commercial facility—factors that may be considered in determining whether an activity affects commerce include whether the facility is open to out-of-state visitors; whether the products it exhibits or sells originated out of state, or have traveled through other states; and whether facilities of this kind, in the aggregate, would affect interstate commerce.⁶³

Places of public accommodation bear unique responsibilities under the ADA. In addition to the general prohibition against disability-based discrimination in section 302(a), subsequent provisions delineate specific forms of discrimination encompassed by the Act, which include subjecting an individual or class of individuals with disabilities, directly or indirectly, to any of the following actions: denying the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations; affording an unequal opportunity to participate in or benefit from the entity’s accommodations; providing an opportunity that is different or separate, unless such difference is necessary to provide an individual with a disability an equally effective opportunity as that provided others; affording opportunities that are not in “the most integrated

60. See 42 U.S.C. §§ 12181, 12183.

61. See *Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1179 (C.D. Cal. 1998) (deeming a movie studio production set a commercial facility that is not otherwise a place of public accommodation).

62. See *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1267 (D. Minn. 1997). The *Ellerbe* court concluded that Congress did not intend the definition of “public accommodation” to subsume “commercial facility” lest the reference to commercial facility would have no meaning under the statute. See *id.* Therefore, the court, directly quoting H.R. REP. NO. 101-485, pt. 2, at 116 (1990), held that commercial facility is the broader of the two categories: “[T]he use of the term ‘commercial facilities’ is designed to cover those structures that are not included within the specific definition of ‘public accommodation.’” *Id.* See also *Burgdorf, supra* note 4, at 577 (labeling commercial facilities definition “extraordinarily broad”).

63. See *Sullivan, supra* note 57, at 1129 n.58 (citing U.S. Dep’t of Justice, Technical Assistance Manual on the Americans with Disabilities Act (BNA) III-1.2000 (Supp. 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html>). Courts have also broadly construed “affecting commerce.” See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) (holding that congressional finding of rational basis to regulate commerce sufficient to prohibit racial discrimination in places of public accommodation); see also *Wickard v. Filburn*, 317 U.S. 111 (1942) (aggregate intrastate activities may be used to demonstrate constitutionally sufficient effects on interstate commerce).

setting appropriate to the needs of the individual"; using standards or methods of administration that have the effect of discriminating or perpetuating the discrimination of others who are subject to common administrative control; and excluding or denying equal treatment to an individual because of that individual's association or relationship with a person with a disability.⁶⁴

Further, public accommodations must also refrain from the following acts of discrimination specified in section 302(b)(2): "[imposing or applying] eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless such criteria can be shown to be necessary . . ."; "fail[ing] to make reasonable modifications"⁶⁵ in policies, practices, or procedures, when such modifications are necessary to afford persons with disabilities equal access to the entity's goods or services, unless the entity can show that making such modifications would fundamentally alter the nature of the entity's goods, services, facilities, etc.; failing to ensure that persons with disabilities are not segregated or otherwise denied services by not providing auxiliary aids and services,⁶⁶ unless the entity can show that making such modifications would fundamentally alter the nature of the entity's goods, services, facilities, etc.; neglecting to remove architectural barriers that are structural in nature in existing facilities, where such removal is "readily achievable";⁶⁷ and where an entity can

64. 42 U.S.C. § 12182(b)(1).

65. To determine the reasonableness of the modifications required under the ADA, courts undertake a fact-specific, case-by-case inquiry that considers effectiveness of the proposed modification in light of the disability in question and the cost to the organization that would implement the modification. *See* *Staron v. McDonald's Corp.*, 51 F.3d 353 (2d Cir. 1995); *see also* *Roberts ex rel. Rodenberg-Roberts v. Kinder Care Learning Ctrs., Inc.*, 86 F.3d 844 (8th Cir. 1996) (requiring day care center to provide one-on-one supervision for disabled child would amount to undue burden given that such attention would cause the day care center to lose ninety-five dollars per week).

66. Auxiliary aids and services include but are not limited to note takers, written materials, telephone handset amplifiers, close captions decoders, devices for deaf persons (TDDs), videotext displays, Brailled materials, and large print materials. *See* ROTHSTEIN, *supra* note 57, § 5.06, at 367 (citing 28 C.F.R. § 36.303(b) (2002)). Courts similarly employ a case-by-case analysis of "undue burden" when assessing the requirement to provide auxiliary aids and services. *See id.* Such an analysis contemplates "significant difficulty or expense" in light of the nature and cost of the action, the overall financial resources of the program, and legitimate safety concerns. *See id.* (citing 56 Fed. Reg. 35,567-68 (July 26, 1991) (referring to 42 U.S.C. § 12111(10) and 28 C.F.R. §§ 36.303, 36.309)).

67. The ADA defines "readily achievable" as:

easily accomplishable and able to be carried out without much difficulty or expense. . . . [F]actors to be considered include—(A) the nature and cost of the

demonstrate that removal of such architectural barriers mentioned in the previous category is not readily achievable, failing to make its goods, services, facilities, etc. available through alternative means, when such alternative means are readily achievable.⁶⁸

The ADA subjects both places of public accommodation and commercial facilities to its provisions when either type of entity designs or constructs new facilities or alters its facilities so as to affect or possibly affect the usability of the facility.⁶⁹ Specifically, section 303 of Title III deems as discrimination “failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection” According to a House Judiciary Committee report, the “readily accessible to and usable by” standard cited for new and altered facilities carries a higher burden than the “readily achievable” standard required to render existing facilities accessible to disabled persons.⁷⁰ For new construction and alterations, the purpose of the ADA is to ensure the service offered to persons with disabilities is equal to that offered to others.⁷¹ For example, a bank with existing Automatic Teller Machines (ATMs) would be required to make them accessible if doing so were “readily achievable,” whereas a new bank would be required to design and construct the facility to provide that all ATMs are “readily accessible to and usable by” persons with disabilities.⁷² It would be insufficient that persons with disabilities could conduct business inside the bank; ATMs provide an additional

action needed under this Act; (B) the overall financial resources of the facility . . . involved in the action; the number of persons employed at such facility; . . . or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity . . . ; and (D) the type of operation or operations of the covered entity

42 U.S.C. § 12181(9). Such definition bears close resemblance to the factors considered under reasonable modifications. See discussion *supra* note 65.

68. See 42 U.S.C. § 12182(b)(2).

69. See *id.* § 12183(a).

70. See Christopher G. Bell, *Questions and Answers*, in THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 256 (1990) (citing H.R. REP. NO. 101-485, pt. 3, at 59–62 (1990) (Judiciary Committee)). The committee report continues by adding, “ADA is geared to the future—the goal being that, over time, access will be the rule rather than the exception.” *Id.* at 259 (citing H.R. REP. NO. 101-485, pt. 3, at 62–65).

71. See *id.*

72. See *id.*

service that must be made available to persons with disabilities.⁷³ The “readily accessible to and usable by” standard applies equally to alterations when such alterations affect or could affect the usability of the facility.⁷⁴

To facilitate compliance with the standards set out in Titles II and III, an independent federal agency established by section 502 of the Rehabilitation Act,⁷⁵ the Access Board, convened to promote accessibility for individuals with disabilities.⁷⁶ The Access Board initially issued the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which apply to all types of buildings and facilities, and the Department of Justice adopted the ADAAG as the Standard for Accessible Design for Title III pursuant to its authority and mandate under the ADA.⁷⁷ Generally, newly constructed and altered recreation facilities and outdoor developed areas are required to comply with the ADAAG.⁷⁸

When contemplating accessibility guidelines, outdoor developed areas present unique obstacles, which the ADAAG simply did not address. As the first step in tackling some of these special issues, the Access Board assembled a Recreation Access Advisory Committee (RAAC) in July 1993; a year later, the RAAC issued a report focusing on various types of recreation areas.⁷⁹ Specifically, the report identified the features lacking in the ADAAG, and made

73. *See id.*

74. *See* 42 U.S.C. § 12183(a)(2). The House Judiciary Committee report commented, “when alterations are being made, they must be done in a manner such that, to the maximum extent feasible, the altered area is readily accessible to and usable by individuals with disabilities. It simply makes no sense to alter premises in a manner that does not consider access.” *See* Bell, *supra* note 70, at 260 (citing H.R. REP. NO. 101-485, pt. 3, at 62-65).

75. 29 U.S.C. § 792 (2002). The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797, served as a predecessor to the ADA by requiring those entities which received federal funding to make their facilities accessible to persons with disabilities.

76. REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 1 n.1. The Access Board consists of twenty-five members, thirteen of whom the President appointed from among the public, and among those, a majority who were required to be persons with disabilities. The remaining members comprise heads of the following federal agencies: the Departments of Public Health and Human Services, Education, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, Veterans Affairs, and Commerce; and General Services Administration; and the United States Postal Service. *See id.*; *see also* 29 U.S.C. § 792(a)(1) (statutory establishment of Architectural and Transportation Barriers Compliance Board (the “Access Board”)).

77. REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 1-2; *see also* 28 C.F.R. pt. 36 app. A (2002) (codification of ADAAG).

78. REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 1.

79. *Id.* at 2.

recommendations to address those gaps.⁸⁰ Although the public comment attendant upon the release of the RAAC report revealed general support for its findings, the responses also showed a lack of consensus on several major issues among the numerous interested groups which may ultimately be affected by the accessibility rules for outdoor areas.⁸¹

The Access Board decided to develop accessibility guidelines through regulatory negotiation, a process that allows for face-to-face negotiations among representatives of affected interests, to arrive by consensus on the text of the proposed rules.⁸² The resulting committee—the Regulatory Negotiation Committee on Accessibility Guidelines for Outdoor Developed Areas (the “Regulatory Negotiation Committee”)—identified several basic principles to guide its negotiations. The members weighed the desire to protect the environment and preserve the outdoor experience against the goal of providing equality of opportunity by maximizing accessibility.⁸³

The resulting report provides a detailed section-by-section analysis of the committee’s proposed rules.⁸⁴ Because these rules are intended to guide designers and builders of outdoor developed areas, they are quite technical. To provide a flavor for some of the requirements under the Regulatory Negotiation Committee’s report,

80. *Id.*

81. *Id.*

82. The Regulatory Negotiation Committee on Accessibility Guidelines for Outdoor Developed Areas (the “Regulatory Negotiation Committee”) consisted of nineteen non-governmental organizations and seven agencies of federal and state governments. *Id.* at 2–3. The committee met ten times over a two-year period, and public attendance at their meetings exceeded 250 persons. The committee relied heavily on the RAAC report issued in July 1993, and also considered various approaches used by state and local governments in developing their own outdoor accessibility guidelines. *Id.* at 2.

83. *Id.* at 4. Other guiding principles included being reasonable, clear, and understandable; addressing safety concerns; providing guidelines that are enforceable and measurable; to the extent possible, remaining consistent with ADAAG; and basing their resulting proposals on independent use by persons with disabilities. *See id.*

84. *See id.* Because the proposed rules apply only to new construction and alterations, the report clearly delineates the definition of alteration as opposed to mere maintenance, to which the rules do not apply. *See id.* at 5. As applied to trails, maintenance and repair is performed to return the trail or a segment of the trail to the standards and conditions to which it was originally designed and built. *Id.* An alteration, on the other hand, changes the original purpose, intent, or design of the trail. *Id.* The following constitute maintenance: 1) removal of debris and vegetation, such as downed trees, broken branches, or rock slides; 2) maintenance of trail tread, such as filling of ruts and entrenchments, reshaping the trail bed, or repairing the trail surface or washouts; 3) erosion control and drainage; and 4) repair of trail and/or trailhead structures, such as replacing deteriorated, damaged, or vandalized parts of bridges, boardwalks, information kiosks, fencing, and railings. *See id.*

this Note will provide a brief overview of the provisions pertaining to trail design and construction.⁸⁵

Like the compliance requirements under the ADAAG, all newly constructed and altered trails connected to accessible trails or designated trailheads must comply with the committee's proposed rules.⁸⁶ Under the proposed rules, a trail is defined as "[a] route that is designed, designated, or constructed for recreational pedestrian use or provided as an . . . alternative to vehicular routes within a transportation system."⁸⁷ Although pedestrians commonly use all trails, the guidelines apply only to trails where travel on foot is one of the designated uses for which the trail was created.⁸⁸ A sampling of the technical provisions for trails include: 1) the surface of accessible trails should be "firm" and "stable";⁸⁹ 2) the clear trail tread width should be thirty-six inches minimum;⁹⁰ protruding objects on the trail must comply with ADAAG Rule 4.4.1⁹¹ and shall have eighty inches minimum clear headroom;⁹² the maximum cross slope of trail segments should not exceed 1:20;⁹³ and the running slope should not

85. This Note will focus on trail design and construction because, if nothing else, lands protected by a conservation easement with a public access component will typically offer some type of passageway through the area. Other aspects of outdoor recreation areas covered in the Regulatory Negotiations Committee's Final Report include beach accessibility; fixed picnic tables; fire rings, cooking surfaces, and grills; fixed trash and recycling containers; wood stoves and fireplaces; overlooks and viewing areas; telescopes and periscopes; fixed benches; fixed pit toilets; camping facilities; outdoor rinsing showers; and warming huts. *See generally id.*

86. *See id.* at 12. "Accessible trails" include newly constructed and altered trails that meet all of the requirements of section 16.2 of the proposed rules; a "designated trailhead" is a "point of access" to a trail intended for public use and may be reached by vehicular or pedestrian access. *See id.* at 12-13.

87. *See id.* at 11.

88. *See id.* at 12. For example, a trail that is designed primarily for mountain biking or equestrian use, even if used by pedestrians, would not be required to comply with the proposed accessibility rules; however, a multi-use trail—a trail designed for both hiking and biking—would be considered a pedestrian trail, and therefore must comply with the rules. *Id.*

89. *Id.* at 16 (discussing proposed Rule 16.2.1). "Firm" means surfaces that do not "give way significantly under foot," while "stable" surfaces "do not shift from side-to-side or when turning." *See id.* app. at 81.

90. *Id.* at 16-17 (discussing proposed Rule 16.2.2). "Tread width" denotes the path or visible trail surface perpendicular to the direction of travel. *See id.* at 49.

91. *See* 28 C.F.R. pt. 36 app. A § 4.4.1 (2002) (providing detailed technical provisions for protruding objects).

92. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 17 (discussing proposed Rule 16.2.4).

93. *See id.* at 18 (discussing proposed Rule 16.2.7.1). "Cross slope" is the angle of the trail tread perpendicular to the direction of travel (the side to side slope of the trail). *Id.* app. at 84.

exceed 1:12 slope on more than thirty percent of the total trail length.⁹⁴

Remote and/or relatively pristine outdoor areas cause particular apprehension when considering accessibility: making backcountry trails accessible may jeopardize the very qualities of the area needing special protection. Moreover, the natural features of an area may make accessibility financially impracticable if not logistically impossible.⁹⁵ To allay these concerns, the committee provided for four distinct conditions that permit departure from the specific technical provisions.⁹⁶

The first condition for departure arises where compliance would cause substantial harm to cultural, historic, religious, or significant natural features or characteristics.⁹⁷ A significant natural feature may include a large rock, outcrop, tree, or a body of water, which would interfere with trail construction or would be destroyed if the trail were constructed pursuant to the proposed accessibility requirements.⁹⁸ This condition for departure includes areas protected under federal or state environmental protection laws, such as areas serving as habitat for threatened or endangered species or designated wetlands.⁹⁹ It also applies to areas where “compliance would directly or indirectly substantially harm natural habitat or vegetation.”¹⁰⁰ Significant cultural features include archeological sites, sacred lands, burial grounds, cemeteries, and protected Native American sites; significant historical features include properties on or eligible for the National Register of Historic Places or other places of recognized

94. *Id.* at 18–19 (discussing proposed Rule 16.2.7.2). “Trail running slope” represents the steepness of individual segments of the trail and should be measured parallel to the direction of travel. *Id.* app. at 84–85.

In addition to the four general conditional departures discussed *infra*, proposed Rule 16.2 provides four technical exceptions where certain situations exist, such as excessive cross or running slopes, certain trail obstacles, neither firm nor stable soil for a distance of forty-five feet or more, or an inadequate clear width over a particular distance. *Id.* at 15. The report also noted that handrails are never required on trails. *Id.* at 19.

95. *See id.* at 8–9.

96. *See id.* at 8. The report provides, however, where designers or operators depart from a specific technical provision because one or more of the relevant conditions exist, the other technical provisions should be applied unless a combination of factors and conditions render it impracticable to make the entire portion of the trail accessible. *Id.* at 11. While the proposed accessibility guidelines address certain circumstances where designers and operators may not be able to achieve accessibility, the report explicitly encourages them to provide access to the greatest extent possible. *See id.*

97. *Id.* at 9.

98. *Id.*

99. *Id.*

100. *Id.*

historic value; and significant religious features include Native American sacred sites and other properties designated or held sacred by an organized religious belief or church.¹⁰¹

The second circumstance permitting departure from the requirements is where compliance would substantially alter the nature of the setting or the purpose of the facility, or portion of the facility.¹⁰² This condition is intended to address concerns that compliance with accessibility requirements may change the nature of a setting to such an extent as to destroy its underlying purpose.¹⁰³ For example, people using primitive trails or camping areas often seek a more natural setting with little or no development.¹⁰⁴ Evidence of manufactured building materials can detract from the primitive scene, and in turn, the users' experience.¹⁰⁵ Further, in these areas, users are often seeking a higher degree of challenge and an opportunity to utilize survival skills, an experience that could be substantially

101. *See id.* In the historic building setting, however, ADA compliance is governed by the ADAAG, which are incorporated by reference in 28 C.F.R. part 36. *See* 28 C.F.R. pt. 36 app. A. (2002). Under the ADAAG, both Titles II and III include a similar exception to the general accessibility requirements where historic preservation is involved. *See* Arkansas Historic Preservation Program, *The Historic Properties Exception In The Americans With Disabilities Act*, available at http://www.arkansaspreservation.org/preservation/ada_compliance.asp (last visited Mar. 22, 2002). The general rule under the ADAAG is that alterations to a qualified historic building must comply with the accessibility rules unless compliance with the requirements would threaten or destroy the historic significance of the building. *See id.* For both public entities and public accommodations, however, the rules state that if compliance with accessibility requirements is not feasible without destroying the historic significance of the building, "alternative methods shall be provided." *Id.* (citing 28 C.F.R. § 35.151(d)(2) (public entities), 28 C.F.R. § 36.405(b) (public accommodations)). Such alternative minimum standards, found in subpart C of part 36 of the regulations, are met by: (a) at least one accessible route complying with ADA rules from a site access point to an accessible entrance; (b) at least one accessible entrance which complies with ADA rules; (c) if toilets are provided, at least one toilet facility complying with ADA requirements; (d) accessible routes from an accessible entrance to all publicly used places on at least the level of the accessible entrance (whenever practicable); and (e) displays and written information, documents, etc., displayed at the level of a seated person. *See id.* For example, when providing an elevator to second floor rooms in a historic house museum would destroy architectural features of historic significance, an alternative method of achieving program accessibility would be to provide an audio-visual display of the contents of the upstairs rooms in an accessible location on the first floor. *See id.*

102. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 9.

103. *Id.*

104. *See id.*

105. *See id.*

compromised by compliance with the proposed technical accessibility provisions.¹⁰⁶

Third, one may depart from the ADA's requirements when compliance would involve construction methods or materials that are prohibited by federal, state, or local regulations or statutes.¹⁰⁷ A particularly clear example involves certain designated wilderness areas where use of mechanized equipment and importation of foreign materials are prohibited.¹⁰⁸ Moreover, the report indicates that "local regulations and statutes" were included to accommodate conservation easements which prohibit or restrict construction methods and practices.¹⁰⁹ The report specifically forbids, however, drafting local regulations or statutes, including conservation easements, solely for the purpose of barring use by persons with disabilities.¹¹⁰

The fourth condition occurs where compliance would not be feasible due to terrain or the prevailing construction practices.¹¹¹ Certain natural obstacles, such as steep slopes, may make compliance very difficult as well as cause excessive environmental damage.¹¹² For example, constructing a trail on a steep slope may require extensive cuts or fills, which may be difficult to construct and maintain and could lead to drainage problems and erosion.¹¹³ Similarly, building an accessible trail on such steep terrain may require that it become significantly longer, causing a much greater impact on the environment.¹¹⁴ The report defines "feasible" to mean that which is "reasonably do-able."¹¹⁵

Notably, the Regulatory Negotiation Committee Report acknowledges that while alterations to existing trails are normally

106. *See id.* Other examples that may invoke this conditional departure include a trail intended to provide a rugged, cross-country experience or a rock outcropping intended to offer a rock climbing opportunity. To remove these obstacles or reroute the trail in order to comply with the requirements would destroy the purpose of the setting. *See id.* at 9-10.

107. *Id.* at 10.

108. *See id.* Similar provisions include mandated use of native soil for trail construction and prohibitions against water crossings to protect fragile aquatic features. *See id.*

109. *Id.*

110. *Id.* A statute, therefore, may not arbitrarily restrict a trail width to a dimension that would prevent use by wheelchairs or other mobility devices. *Id.*

111. *Id.*

112. *See id.*

113. *See id.*

114. *See id.* A soil's water content and its susceptibility to erosion may also affect the ability to construct an accessible trail. Other difficult terrain may demand use of equipment not typically used throughout the length of the trail. *See id.*

115. *Id.* at 11.

handled by utilizing "prevailing construction practices," the area's land manager determines the construction practices to be used on new trails.¹¹⁶ Such decisions regarding construction practices necessarily involve reflection on available resources (e.g., machinery, skilled operators, and finances) and the environmental conditions of the area (e.g., soil type and depth, vegetation, and natural slope).¹¹⁷ The intent of the fourth departure, therefore, is to recognize that the effort and resources required to comply should not be disproportionately high relative to the level of access created.¹¹⁸ Although technically feasible, if the effort and resources required are not "reasonable," they would not be required under the proposed rules.¹¹⁹

II. Analysis: Are Land Trusts Subject to the ADA's Mandate?

A. Getting in the ADA's Door:

The Nexus Between the IRC and the ADA

Looking to the statutory requirements to create a properly deductible conservation contribution, several scenarios emerge that may compel ADA compliance on the protected property. First, the qualified real property interest could be granted to a governmental unit, which may include a State, a possession of the United States, or any subdivision of any of the foregoing, or the United States, or the District of Columbia.¹²⁰ Often conservation easements are donated to state conservation agencies, county park districts, and other public entities.¹²¹ For these contributions to qualify for tax purposes,

116. *Id.*

117. *Id.*

118. *See id.*

119. *See id.* The report provides an example that would invoke this conditional departure: although it may be feasible to build a trail with a 1:20 slope or less up a 1500-foot tall mountain using specialized equipment and materials, the resulting trail would be 5.8 miles long (rather than two miles long under a traditional backcountry layout), and would cause negative environmental and aesthetic impacts. *See id.* The report indicates that this departure is intended to ensure that compliance with the provisions does not require the use of construction practices that are "above and beyond the skills and resources of the trail building organization"; however, it is not meant to automatically exempt an organization from the provisions simply because of a particular practice when more expedient methods and resources are available. *Id.*

120. *See* Treas. Reg. § 1.170A-14(c)(1)(i) (as amended in 1999).

121. *See, e.g.,* DIEHL & BARRETT, *supra* note 12, caption at 48: When the Grace Marchant Garden in San Francisco, which harbors more than a hundred species of plants, faced encroaching development, local citizens and the Trust for Public Land raised

however, the donation must be made “for exclusively public purposes.”¹²² In this situation, it seems particularly clear that the agency’s management of the protected property for public purposes would constitute “services, programs, or activities of a public entity,” thereby requiring the public agency donee to ensure that “no qualified individual with a disability[,] . . . by reason of such disability, [is] excluded from participation in or [] denied the benefits of” the protected property.¹²³ It bears noting that the conservation purpose (as opposed to the requirement of “exclusively public purpose”) of such a donation may not in itself require public access, such as when the donation is made for preservation of a significant habitat or ecosystem.¹²⁴ Preservation of this kind may still qualify under the “exclusively public purpose” requirement of section 170(c)(1), but may not implicate ADA compliance. If no access is allowed to any member of the public, then an individual with a disability is not excluded from participation in or denied the benefits of the protected property “by reason of such disability[.]”¹²⁵

A more uncertain application of the ADA arises when a nonprofit land trust accepts a donation of a conservation easement. When a land trust serves as the “qualified organization” for IRC section 170(h) purposes, seemingly only those qualified “conservation purposes” requiring public access—outdoor recreation by or education of the general public and certain historic preservation—would invoke ADA scrutiny, and only then if the land trust itself is deemed one of the defined entities governed by the Act. Determination of a land trust’s entity status may be evaluated in two distinct ways: 1) that the nonprofit organization, as keeper of lands open to the public, is acting as an instrumentality of the local government, placing it within the ADA’s Title II requirements; or 2) that the land trust’s operation of property open to the public renders it a place of “public accommodation” under Title III of the Act.

First, case law suggests that private entities are deemed instrumentalities of the state only in narrow circumstances. The Pennsylvania Supreme Court held that a nonprofit corporation was a “public entity” for immunity purposes under the state’s tort claims act, but only after emphasizing that the city created, funded, and

sufficient funds to purchase the property. They placed a conservation easement on the property, which the City of San Francisco now holds. *See id.*

122. *See* 26 U.S.C. § 170(c)(1) (2002).

123. *See* 42 U.S.C. § 12132 (2002).

124. *See* Treas. Reg. § 1.170A-14(d)(3).

125. *See* 42 U.S.C. § 12132.

exerted substantial control over the nonprofit entity, and that the entity's sole purpose was to assist the city to meet the needs of its citizens with respect to natural gas service.¹²⁶ The court also looked to the underlying purpose of the tort claims act, which was intended to protect cities and their instrumentalities from devastating monetary recoveries, to conclude that this private, but essentially city-run, entity should enjoy such immunity.¹²⁷ Similarly limiting the applicability of "instrumentality of the state" analysis, the New Mexico Supreme Court held that the standard to be applied when determining when a private entity should be considered a "political subdivision" or "local public body" is whether "under the totality of the circumstances the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity."¹²⁸ As most land trusts operate wholly independently from the local government, it seems unlikely under the foregoing criteria that a land trust would be deemed an instrumentality of the state.¹²⁹

In *Marsh v. State of Alabama*,¹³⁰ however, the United States Supreme Court provided a slightly broader definition of public instrumentality in determining that a privately owned company town had violated the plaintiff's constitutional rights by prohibiting her from distributing religious materials on the sidewalk.¹³¹ The *Marsh* Court maintained that despite the town's private entity status, because it was built and operated primarily for benefit of the public and thus was essentially a public function, it was subject to state regulation.¹³² The Court held:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.¹³³

126. *Sphere Drake Ins. Co. v. Phila. Gas Works*, 782 A.2d 510, 515–16 (Pa. 2001).

127. *See id.* at 515.

128. *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 12 P.3d 431, 434 (N.M. 2000).

129. Arguably, land trusts share a common mission with local governments in seeking to promote green space for the benefit of the general public; but this notion, even if true, would not rise to the alter ego level established by the New Mexico Supreme Court. *See id.* Further, some land trusts receive partial funding from governmental agencies, but again, the nexus would not meet the high level of connectivity articulated by either the Pennsylvania or New Mexico courts. Seemingly, only if a governmental entity created, funded, and substantially controlled a land trust would it be deemed an instrumentality of the state. *See Sphere Drake Ins. Co.*, 782 A.2d at 516.

130. 326 U.S. 501 (1946).

131. *See id.* at 502.

132. *See id.* at 506.

133. *Id.*

Analogously, as the land trust—arguably for the advantage of obtaining the conservation easement and in turn, furthering its stated mission—opens the protected property for use by the general public, the trust's rights become circumscribed by the statutory rights of those who use it.¹³⁴ Although the holding and maintaining of land for the benefit of the public differs slightly from the operation of “privately held bridges, ferries, turnpikes and railroads”—named as examples of public functions in *Marsh*—disability advocates may assert and activist judges may decide that nonprofit land trusts serve essentially a public function by providing park-type lands open to public use, and thus should fall within Title II of the ADA.¹³⁵ Further, if the area held open by the land trust abuts public land or provides the only inroad to public land, this contention may be afforded added weight.

Private entities fall within the reach of the ADA's Title III when they own, lease (or lease to), or operate places of public accommodations.¹³⁶ A land trust, once accepting the rights protected under the easement, owns such rights and, for those easements providing public access, operates the protected area through its maintenance and enforcement of the easement's terms. The land trust's encumbered property requiring public access would fall within the ADA's ninth category of public accommodations—parks, zoos, amusement parks, other places of recreation; the question for land trusts, therefore, is to what extent their operations “affect commerce.”¹³⁷ Looking to the Department of Justice's Technical Assistance Manual guidelines, certainly a land trust's recreation area would be open to out-of-state visitors, and with numerous “facilities of this kind,” existing throughout the United States, in the aggregate, their operations could affect interstate commerce by promoting travel and related consumerism.¹³⁸ Yet such areas do not often exhibit or sell products at all, so none could originate out of state, or could have traveled through other states.¹³⁹ Some land trusts, however, do

134. *See id.*

135. *See id.*

136. *See* 42 U.S.C. § 12182 (2002).

137. *See* 42 U.S.C. § 12181(7)(I).

138. *See* U.S. Dep't of Justice, Technical Assistance Manual on the Americans with Disabilities Act (BNA) III-1.2000 (Supp. 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html>.

139. *See id.* Some protected properties, especially those of historic or biological significance or uniqueness, may sell souvenirs of some kind. Operations of these properties would more directly affect commerce. *See Katzenbach v. McClung*, 379 U.S.

require a nominal payment to enter and use their protected areas to fund ongoing maintenance and conservation-based education programs.¹⁴⁰ When a fee is charged for use of an easement-protected park or recreation area, the land trust's operations arguably "affect commerce" more directly than when no fee is charged.¹⁴¹ Using this analysis as a backdrop, courts could find that Congress acted rationally in determining that parks and other recreational areas could affect commerce in such a way as to require ADA compliance under its "public accommodations" rubric.¹⁴²

B. And Back Out Again: The ADA's Exceptions May Serve to Exempt Land Trusts from Many of the ADA's Requirements

The four main exceptions delineated in the Regulatory Negotiation Committee's final report ensure that ADA compliance will not place unreasonable burdens on the managers of outdoor recreation areas or on the natural environment.¹⁴³ A land trust, as a land manager, upon concluding that use of a particular property invokes the ADA, must then consider whether compliance with the ADA's provisions would place an undue burden on the trust or the land itself.¹⁴⁴ First, the land trust would ask whether compliance would harm cultural, historic, religious, or significant natural features or characteristics inherent in the protected property.¹⁴⁵ It is possible

294, 302 (1964) (holding that sales of goods, even when interstate movement of the goods cannot be shown, affects interstate commerce).

140. E-mail from Greg Hendrickson, Coblenz, Patch, Duffy & Bass, LLP, to Ellen Fred (Mar. 7, 2002) (on file with author) (Mr. Hendrickson, who specializes in advising land trusts and crafting conservation easements, provided several examples of land trusts which ask for small fees in exchange for the use of the protected recreation area. He noted an area in the North Bay region of San Francisco Bay where an historical garden recently became the subject of a conservation easement. In exchange for a small fee, the area will be open for garden tours, which Mr. Hendrickson believed might propel the exchange into interstate commerce.).

141. It is hard to imagine how operating a nature trail through undeveloped property, offering no items for sale, and requiring no fee for entrance affects commerce to an extent envisioned by Congress to invoke ADA compliance. *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (holding that simply possessing a gun in a school zone, without more, does not implicate interstate commerce). Seemingly, Congress did not intend such a result when including the requirement that the operations "affect commerce" in the definitions of "public accommodations" and "commercial facilities." *See* 42 U.S.C. § 12181 (2002).

142. *Cf. Katzenbach*, 379 U.S. at 303-04 (holding that congressional finding of rational basis to regulate commerce sufficient to prohibit racial discrimination in places of public accommodation).

143. *See generally* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 8-11.

144. *See id.*

145. *See id.* at 8-9.

that a land trust could encounter each of the listed factors, as cultural, historic, natural, and possibly even religious features could be the subject of a conservation easement's "conservation purpose."¹⁴⁶

Second, the land trust would ask whether compliance would substantially alter the nature of the setting or the purpose of the facility, or portion of the facility.¹⁴⁷ Here, the land trust would assess the overall purpose of the protected property, and then inquire whether ADA compliance would substantially alter the nature of that setting. For example, if the land trust accepted a conservation easement under the conservation purpose of "outdoor recreation by, or education of, the general public,"¹⁴⁸ with the expressed intention to provide opportunities for a primitive, backcountry hiking experience, such goal could be substantially altered by ADA compliance.¹⁴⁹ Conversely, a conservation easement with the same conservation purpose of "outdoor recreation by, or education of, the general public," but with the expressed goal of providing pedestrian trails for bird watching, compliance with the ADA's provisions would not likely alter the nature of the setting.¹⁵⁰

Third, where federal, state, or local regulations preclude construction methods required for ADA compliance, the land trust would not be required to comply.¹⁵¹ The description of this departure specifically includes restrictions imposed by "conservation easements' or 'development rights' programs" in the definition of "regulations."¹⁵² First, the land trust would need to determine whether a particular environmental regulation or statute governed the area under protection. If the easement served to protect critical habitat of endangered or threatened species, the Endangered Species

146. For example, a conservation easement could serve to protect significant habitat or ecosystem (significant natural features), *see* Treas. Reg. § 1.170A-14(d)(3)(ii) (as amended in 1999); open space under a local governmental conservation policy specifically deeming certain sacred Native American lands as worthy of protection (cultural or religious features), *see id.* § 1.170A-14(d)(4)(iii); or a historic structure listed in the National Register (historic features), *see id.* § 1.170A-14(d)(5)(iii). All of these would seemingly invoke the first condition for departure if compliance with ADA's provisions would harm any of these aspects of the protected property. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 9.

147. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 9-10.

148. *See* Treas. Reg. § 1.170A-14(d)(2).

149. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 9.

150. *See id.*

151. *See id.* at 10.

152. *Id.*

Act would restrict activities on such land.¹⁵³ If construction methods required for ADA compliance violated the Endangered Species Act,¹⁵⁴ the trust would be entitled to depart from the ADA's provisions.¹⁵⁵ The land trust would also consult the terms of the easement to garner explicit restrictions placed on the use of the protected land; the land trust may even choose initially to construct the terms of the easement in such a way as to prioritize ecological protection.¹⁵⁶ So long as the restrictions were not included in the easement for the sole purpose of avoiding ADA compliance, such restrictions would serve to exempt the land trust from the ADA's requirements.¹⁵⁷

Finally, the land trust could avoid the ADA's requirements if compliance would not be feasible due to terrain or the prevailing construction practices.¹⁵⁸ If compliance with the ADA's provisions would not be "reasonably do-able," even if technically feasible, compliance is not required.¹⁵⁹ Because the Regulatory Negotiation Committee Report acknowledges the land manager—here, the land trust—determines the construction practices to be used on new trails,¹⁶⁰ the trust must consider its available resources (e.g., equipment, volunteer or paid staff, and finances) and the environmental conditions of the area (e.g., soil type and depth, vegetation, and natural slope) in developing a construction plan.¹⁶¹ The stated intent of this departure is to avoid unduly burdening the "trail building organization" by requiring ADA compliance.¹⁶²

153. *See generally* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000 & Supp. 2002).

154. For example, using mechanized equipment necessary to comply with ADA's technical provisions on land serving as habitat for a threatened bird that is extremely sensitive to loud noise would arguably qualify as an illegal "taking" under the Endangered Species Act. *See id.* § 1538(a)(1)(B) (prohibiting any person subject to the jurisdiction of the United States from "taking" an endangered species of fish or wildlife within the United States or territorial sea of the United States); *id.* § 1532(19) (defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"). Causing a bird to flee from its habitat because of loud noise would arguably constitute unlawful harassment of the species. *See id.*

155. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 10.

156. *See id.*

157. *See id.*

158. *See id.*

159. *Id.* at 11.

160. *See id.*

161. *Id.*

162. *See id.*

A land trust with a large budget and/or large volunteer base may find that it must comply with the ADA's provisions if such compliance is "reasonably do-able."¹⁶³ A fact-specific inquiry would assist with such determination.¹⁶⁴ A land trust may find that certain areas of the property may not require ADA compliance by virtue of the applicability of one or more of the aforementioned conditional departures, while other areas may be required to comply.¹⁶⁵

Conclusion

A land trust entering into conservation easement negotiations with a landowner should contemplate ways in which the agreement could invoke ADA compliance. The land trust should not fear the ADA, as it provides persons with disabilities an equal ability to enjoy areas made open to the public as a whole. Rather, the land trust should acknowledge the ADA's mandate, and should figure its requirements into the planning, drafting, and negotiation phases of the conservation easement as well as the easement's implementation and maintenance.

163. *See id.*

164. *Cf. Staron v. McDonald's Corp.*, 51 F.3d 353 (2d Cir. 1995) (In determining the reasonableness of modifications required under the ADA, courts undertake a fact-specific, case-by-case inquiry that considers effectiveness of the proposed modification in light of the disability in question and the cost to the organization that would implement the modification.).

165. *See* REGULATORY NEGOTIATION COMMITTEE FINAL REPORT, *supra* note 1, at 8 (Where one of the conditions of departure exist, only that component of the property is exempt from ADA compliance unless a combination of factors and conditions make it impracticable to comply on the entire area.).
